

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 98/12

In the matter of :-

General Haulage Ltd.

(now known as "Power Parts Ltd")

Appellant

v/s

Municipal Council of Vacoas/Phoenix

Respondent

DETERMINATION

The present appeal dates back to 13th April 2011. It is against a decision taken by the Municipal Council of Vacoas/Phoenix (hereinafter referred to as "the Council"), for having rejected an application made by the Appellant for a Building and Land Use Permit (BLUP) to operate as a Dealer in Motor vehicles and Spare parts in part of an existing commercial building at Royal Road, Castel. The decision of the Council was communicated to the Appellant by a letter dated 29th March 2011 wherein it was stated that the ground for rejection was "*...an application for a similar development was turned down and the decision of the Permits and Business Monitoring Committee was confirmed by the Town and Country Planning Board on appeal. The reasons put forward by the Town and Country Planning Board are still valid today*".

The appeal was initially lodged before the Town and Country Planning Board (TCPB). Following the enactment of the Environment and Land Use Appeal Tribunal Act 2012, this appeal was forwarded to the Tribunal in October 2012, which explains the presence of a bundle of documents already in the file. Pleadings were filed before the Tribunal. Both parties were legally represented at the hearing. The Appellant's representative, Mr. Goburdhun Mutty, deponed under solemn affirmation and was cross-examined by Respondent's counsel. The Acting Head, Land Use and Planning Division deponed on behalf of the Council and was also subjected to cross-examination.

BACKGROUND

The statement of case contains an averment that the reason for which the Respondent rejected the application was infact contained in a letter dated 9th October 2009. The Appellant's representative gave the evidence that he had applied for the same BLUP to the Council in 2009 but his application was rejected on two grounds:

- "1. Parking space shown on the plans in front of the proposed development is not functional;
2. Proposed development would constitute an intensification of commercial activities and will give rise to traffic and parking problems."

The decision of the Council was upheld by the Town and Country Planning Board on appeal. The appellant subsequently made a second application for the BLUP on 21st February 2011, as per his application form. This appeal was also rejected *vide* a letter dated 29th March 2011, mentioned above, hence the present appeal.

We pause here to make an observation. It was borne out in evidence, that the Appellant company already holds a BLUP to operate as a Dealer in Spare parts on the locus *in lite*, a BLUP which normally encompasses two activities, that is to operate as Dealer in 'Motor vehicles' and in 'Spare parts'. This being the case, we can only deduce that the BLUP to operate as Dealer in Spare Parts must have been granted by the Respondent to the Appellant in 2009 prior to the latter applying for a BLUP to operate as Dealer in Motor Vehicles. Annexure 3 of the statement of defence also supports this inference.

THE ISSUES: GROUNDS OF APPEAL

The five grounds of appeal set out in the Appellant's statement of case essentially relate to the two grounds of rejection given by the Respondent and these fall under the 2 broad headings of issues relating to *traffic/parking* and *intensification of commercial activities*.

We have duly considered all the evidence placed before us including submissions of both counsels. We will deal with the issue of intensification of commercial activities first because it also relates ultimately to parking issues.

A. INTENSIFICATION OF COMMERCIAL ACTIVITIES

I. CONTEXT ANALYSIS

It is common ground that the proposed development is meant to take place on the ground floor in an existing commercial building located on the main road in Castel, which is a mixed use area of residential and commercial developments. The floor area of the building to be used is 161 sq.m, as per the plan submitted and that the site has a total road frontage of 20.63m. The property *in lite* is bordered on the lateral sides by two access roads. The building also accommodates a glass selling shop by the name of Efflux Glass Works and the total road frontage of 20.63m includes the frontage of Efflux Glass Works.

II. THE INSTRUMENTS AND THE LAW

The site being in Castel, the applicable outline scheme is **Planning Scheme for Vacoas/Phoenix** issued under the **Planning and Development Act 2004** and the applicable Planning Policy Guidance is **PPG1**.

Section 117 (7) of the Local Government Act states that for an application of a Building and Land Use Permit, the Permits and Business Monitoring Committee shall within 14 days of its effective date of receipt and after approval of the Executive Committee either issue the permit or notify the applicant that his application for a permit has not been approved and state the reasons for it.

The application was made by the Appellant on the 21st February 2011. The rejection letter emanating from the Council is dated 29th March 2011. It is therefore clear that once the application was made by the Appellant, it becomes the responsibility of the Council to do a site visit within 2 weeks of the application so as make a planning assessment for the viability of the proposed development and also to ascertain whether the plans submitted reflects the actual onsite conditions in terms of setback, visibility, car park, vehicular access and the like. In the examination in chief of the Respondent's witness she stated in general terms that before the determination of any application inspectors of the Council have an on-site inspection. She stated that she carried out a site visit only on the 31st of May 2011. At some point the witness stated that she had been on the locus in all 3 times, without specifying the dates but stated they were before the last hearing date and before the filing of the statement of defence, which could only be after October 2012. Later, she stated in cross examination that she did not visit the site *in lite* when the application was made. The point we wish to make here is that the

Council seems to have rubber stamped this application as "REJECTED" without reconsidering the merits of it when a renewed application was made in 2011, which in our view is wrong and prejudicial to the Appellant.

It appears that the Council relied mostly, if not solely, on the letter of the TCPB dated 30th September 2010 to the Appellant rejecting its appeal, which to our reading, only mentions that it relied on the report of the TMRSU. At paragraph 2 of Annex 3 of the statement of defence it is stated "*I am directed to inform you that the Board, after considering all the elements of the case (inter-alia the views obtained from the Traffic Management Road Safety Unit) in particular that.....took the view that onsite parking will be inadequate for all the activities...*" Therefore, the way the reasons for rejection have been set out in the letter addressed by the administrative secretary of the TCPB to the Appellant, does not particularly reflect, in our view, what the views of the TMRSU were but it simply seems to be saying in plain language that taking into account the views of the TMRSU amongst others, the TCPB has in its wisdom come to that conclusion.

Two further points off-shooting from the above is that firstly and more importantly, if the Council is relying on the views of the TMRSU and since intensification of commercial activities hence traffic is an issue and the TMRSU is the authority on traffic as stated by the Respondent's witness, then the onus was on the Respondent to call this witness to substantiate their contention. The TMRSU is THE authority that makes an assessment of the traffic conditions in an area, assesses the impact of a development on the traffic in the area and the relevant officer would have enlightened the Tribunal on the density of traffic, conditions such as presence of traffic lights, junction, bus stop, curve in the area and made a comparative study between traffic conditions now and as they were back in 2009 when the Appellant made his first application for the BLUP. There may well have been a change of context in traffic conditions since 2009 which may have either increased or reduced in that area. But unfortunately such crucial evidence was never adduced by the Respondent, evidence upon which the Respondent should have rested its case. It needs no reminding that in a civil case, we stand guided by the principle that "He who avers must prove". Secondly, the tribunal cannot rely on a letter, whose maker has not been called as witness and which is allegedly based on another report whose veracity has not been tested.

The questions that remain to be answered are

1. Will the development constitute an intensification of commercial activities?
2. Will the above give rise to traffic and parking problems?

It is uncontested that there are other business operating in the vicinity and that infact that area of Castel is a mixed up area of both residential and commercial premises. The site lies along the

main road which, we have it in evidence, is a class B road. There are several commercial developments in the vicinity, some have been operating for only a couple of years, and others such as "Silencers", which operates a motor vehicle repair business, is only 20-25 metres away from the Appellant's site. Several photographs have been produced by the appellant in support of his testimony, none of which have been contested either on the intensity of the commercial development in the vicinity or on the type of parking arrangement, most of them having resorted to perpendicular parking. The contention of the Respondent in relation to some of those developments is that they were rather far from the site.

Having considered all the above, we have not been satisfied that the proposed development will constitute an intensification of commercial activities because no evidence has been adduced by the Respondent in support of their contention to show in what way a business activity will intensify with the conversion of a permit of an already existing business operating on the same total surface area. Infact this issue has hardly been canvassed in the examination in chief of the Respondent's witness. When put to her in cross examination, she stated that she believed with an additional activity within the premise, the parking requirements would increase. She conceded that there is no provision on such issue of intensification in the PPG nor the Outline Scheme and agreed also that she was making a subjective appreciation of the situation. Furthermore, it is common ground that two business activities, that is operating as Dealer in Motor vehicles and in Spare Parts are lumped under permit. This being the case, we find that the answer to the first question asked above is in the negative. We therefore move on to the next question regarding the traffic and parking issues.

B. TRAFFICK AND PARKING

I. THE INSTRUMENTS AND THE LAW

The **Outline Scheme of Vacoas-Phoenix** has not been of much assistance on this issue. Policy 7.3 "BUILDING SET BACK" simply states in relation to A or B roads that *vehicular access is allowed only if a vehicle can re-enter the A or B road in forward gear.*

PPG1 contains the **Technical sheet on Commercial and Industrial Roads**, which contains Table 1 CAR PARKING-General Guidelines. It states that for "shops" the requirement is *1 car parking space per 30sq.metre gross floor area.*

It is provided further down under "Note":

"...The above parking guidance will be applied in a manner appropriate to local circumstances together with local and national trends in transport policy making. For example, reduced on plot provision may be acceptable where it can be demonstrated that spaces are not required e.g highly accessible locations, locations well served by public transport, specific user/operational requirements etc.

For the purposes of the calculations, fractions of car spaces shall be rounded upto the nearest whole number."

Here the gross floor area is 161sq.m. Therefore, the parking required is for 5 cars.

It is noteworthy that BLUP was already granted prior to 2009 for operation as Dealer in Spare parts. At that time the number of parking slots available for the business of the Appellant was not made an issue. Since we have concluded that the Respondent has not been able to satisfy this Tribunal that there will be an intensification of the business on the same locus, the amount of parking space required remains unaffected. No distinction was made as to the type of business and this therefore cannot, in our view, prejudice the Appellant.

The Appellant's representative in examination in chief stated that the road on which site is found is a straight road and that visibility is clear whether traffic is Port-Louis bound or Curepipe bound. He intends to accommodate only 2 or 3 vehicles within the premises of the company. He stated that the current business of Spare parts operates mostly on the phone and that the case scenario is usually that people, most of the time motor mechanics phone him to ask if he has a particular spare part. And if he confirms that he has it in the shop, then they would come to take the item at the shop and within 5-10 minutes, the customers would leave. He stated that some of his customers come by car, some by bus and that he also does delivery. There is a bus stop across the road and around 20 metres further away from his shop. He testified extensively on the fact that many commercial premises along Castel road and further have perpendicular parking arrangement. He was not cross-examined on any of the above issues and therefore, the Tribunal accepts his testimony as undisputed evidence. It would appear that the type of clientele he has for his current business of spare parts is rather specific, that is mostly mechanics. His customers would not normally have to resort to parking on the road, hence cause traffic problems, because most of the time the deal is finalized over the phone and that it is usually just a matter of picking up the item from the shop.

We are alive to the fact that the Respondent's planner was also cross-examined on the flow of traffic in the area and while she stated that the flow of traffic has increased over the years

along Castel-Curepipe Road, she also agreed that along Castel Road there is a very regular transport service. That is evidence of the fact that the area is highly accessible and is well served by the public transport. We do not see how the development will intensify the traffic on the locus.

The Respondent's witness also stated at different points that on the type of parking that planners usually recommend, which is "parallel parking". Although she conceded that the term itself is neither found on the PPG nor the Outline Scheme, this Tribunal can appreciate what the witness means by the term. It simply means that the vehicles are to be parked in parallel to the building so that the vehicle can drive into a parking slot and drive out of it in forward gear. She forwarded a copy of *Technical Sheet* of the PPG showing illustrations of the parallel parking and angled parking arrangements on Residential Roads (the stress is ours). We pause here to make an observation that there should be a distinction made between the parking arrangements in a residential area and that in a commercial area. True it is that the PPG does not provide much guidance on what the parking arrangement should be in a commercial area. It gives illustrations what the parking arrangement should be in a residential area and it shows that in a residential area it should be parallel parking. That clearly relates to the residential roads. We would say the underlying logic is that generally such roads are narrower, therefore, to minimize the risk of accidents especially while emerging, it would be safer if the car drives out in forward gear.

This being said, the *Technical sheet on Industrial and Commercial Roads under Vehicle Parking Areas* provides the following

" ..The guidelines represent the levels of parking normally required to avoid on-street parking. The industrial site should be a 'self-contained' development capable of accommodating its own onsite parking needs. The use of the public street for parking and staging of service and delivery vehicles is not acceptable unless specific and safe provision has been made for this in the design proposal."

The Tribunal does appreciate that the *raison d'être* of the PPG is so that, to state so in layman's terms, ways are devised for development to be planned in a way so that there is better control on conurbations, on traffic density, on developments and minimize risks of accidents amongst others. This being said a *Planning Policy Guidance* (the stress is ours) cannot be applied with rigidity because with time, circumstances change, the topography also may change and this in will impact directly the planning assessment. We agree with the submissions of learned counsel for the Appellant who canvassed that the PPG can be flexible. On the present facts, it appears that many commercial developments have resorted to perpendicular parking. We find from the photographs and plan submitted on behalf of the Appellant that the building *in lite* has a rather wide set back of 5.76m from the Castel Road and can therefore cater for four (4) angled-parking slots such that when the vehicles parked on the site reverse out, they may not have to do so

onto the road. The wide space set back of the building from the main road does allow ample space for the vehicles to reverse and emerge onto the main road in forward gear.

For all the reasons set out above, we allow this appeal and order the Municipal Council to grant the Appellant with the relevant permit with the conditions of angled parking spaces to be provided as stated above and that there should be no heavy duty vehicles such as trucks, lorries or even trailers parked in the parking spaces of the site and any other such conditions as the Council deems fit.

Determination delivered on 28th August 2013 by

Mrs. J. RAMFUL

Vice President

Mr.G. SEETOHUL

Assessor

Me. V. Reddi

Assessor